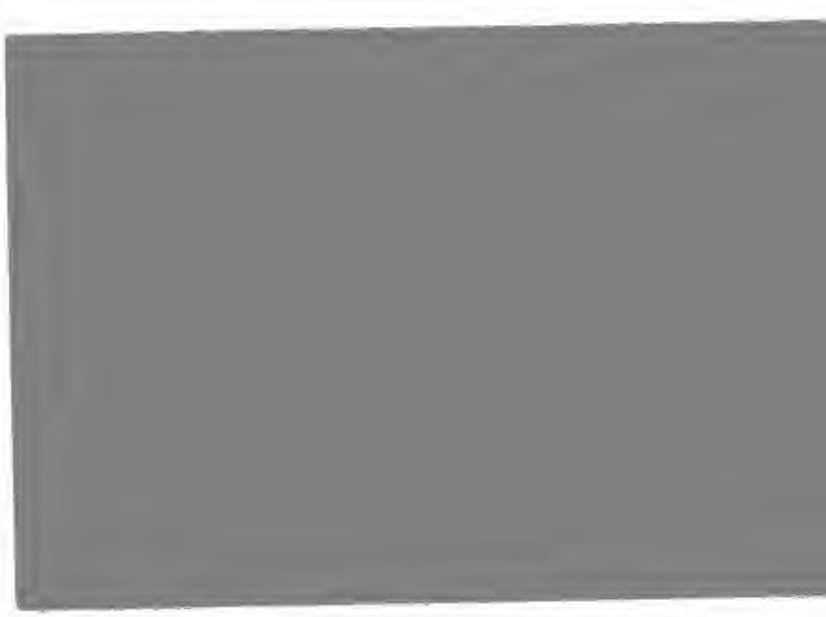
VOLUME 59



(153) Cav V 59 #1

No. 10596 (51 I.A.2d 153) Agenda No. 7

STATE OF ILLINOIS

IN THE APPELLATE COURT

FOURTH DISTRICT

People of the State of Illinois,	:	
Plaintiff-Defendant in Error	:	Error to the
	:	Circuit Court of
vs.	:	Edgar County
John Arthur Smith,	:	
Defendant-Plaintiff in Error	:	

Smith, P.J.:

Defendant was sentenced on March 21, 1961, to the penitentiary for a term of not less than eight nor more than twenty years after conviction by a jury of the crime of burglary. A writ of error originating in the Supreme Court was transferred by that Court to us. Plaintiff in error claims error in that (a) his instruction directing the jury to find him not guilty, if they had a reasonable doubt of his guilt, was not given, (b) photographs of the interior of the building, of certain tools and of damage to a vault wall were erroneously admitted into evidence and (c) that the evidence fails to establish guilt beyond a reasonable doubt.

The Edgar Electric Cooperative Association building located at the north edge of Paris, Illinois, was burglarized on the night of December 5, 1960, about 11:30 p.m. When the sheriff and his deputies arrived, two of them saw and testified that defendant jumped from one of the office windows, ran along the side of the building and halted when a shot was fired into the air. A search of the building disclosed a large hole in the plaster of the wall of a walk-in vault, with a sledge hammer, brace and bit and other tools on the floor in front of it. A casement window nearby was sprung and the screen was torn off. This is the window out of which the defendant came. Defendant's brother was found hiding in a crawl space in the furnace room. A window to the garage where the company trucks were kept had a defective latch and a picnic table had been placed below it and against the wall. A door between the garage and office portions of the building had been forced open. While the search was in progress, officers testified that defendant stated that the building was "bugged" and that's how sheriff knew they were there and that he had gotten the tools off a truck in the garage. Witnesses described the premises, identified the tools as belonging to the company, and the condition of the wall, windows, and door. Photographs of these various items were identified and admitted into evidence.

Defendant was the sole witness in his own behalf; testified to previous convictions for vagrancy; violation of the Dyer Act; attempted escape and petty larceny. He stated

The [illegible] was located [illegible]
located at the north side [illegible] Parish [illegible] was burglarized
on the night of December [illegible], 19[illegible] [illegible]
sheriff and his deputies [illegible]
the defendants [illegible]
the side of the building [illegible] a [illegible]
the wall [illegible] of the building [illegible]
the plaster of the wall [illegible]
hammer, broom and [illegible]
It [illegible] dynamite [illegible]
torn off. This [illegible]
Defendant's brother was [illegible]
furnace room. [illegible]
were kept has a [illegible]
ground below it [illegible]
and office [illegible] of the [illegible]
the search was in progress [illegible]
stated that the building [illegible]
knew they were there and that [illegible]
ground in the garage. [illegible] identified the [illegible]
fied the tools as belonging [illegible] company, and [illegible] the [illegible]
of the wall, windows, and [illegible] these various
items were identified and [illegible]

Defendant was the sole witness in his own behalf;
testified [illegible] previous convictions for [illegible], violation of
the Dyer Act; attempted escape and petty larceny. He [illegible]

that he and his brother were going from Eastern Indiana to Peoria, Illinois, in a Dodge car belonging to his girl friend, that they had trouble with the car and his brother went into the building in search of tools to fix it. When he failed to return, defendant took a tire tool with him, climbed the seven-foot wire fence around the building, heard his brother yell to him to get going, started to run and was apprehended. He denied ever being in the building or hearing a shot or making any of the remarks ascribed to him. He did say they might have him for trespassing. The car was located in a field about a quarter mile from the building.

The trial court gave two of the defendant's instructions on reasonable doubt. The jury was adequately and amply instructed on the issue and we see no reason or basis for a third repetitious instruction on the same issue.

The photographs were taken the night of the burglary and depict the physical condition of the premises, the tools, the furnace room, etc. These were items which had been described by various witnesses and there is no suggestion that they are inaccurate. Defendant contends that they should not have been admitted in evidence as there is no evidence that he was ever in the building or ever saw or used any of these tools. We see no prejudice in the admission of these photographs as a visual aid to the jury.

The contention that the circumstances here related are insufficient to establish the guilt of the defendant beyond a reasonable doubt is without merit. We think the principles

involved in the admissibility of exhibits and the sufficiency of the evidence has been resolved against the plaintiff in error in People v. Craddock, 30 Ill. 2d 348, 196 N.E. 2d 672 and People v. Stanton, 16 Ill. 2d 459, 158 N.E. 2d 47. The facts in those cases are strikingly similar to the case before us. In Stanton at page 468, the Supreme Court stated:

> "The People did not have to prove the particular manner by which an entry was made. (People v. Reeves, 360 Ill. 55.) Burglary can seldom be proved by direct evidence of the actual breaking and entering and the inference of guilt in most cases must necessarily be drawn from other facts satisfactorily proved. (People v. Geisler, 348 Ill. 510.)

The jury heard the testimony of the witnesses as to how the defendant was seen leaving the building, his admissions to the officers as to where he obtained the tools and to the fact that the building must have been "bugged". The defendant's own brother and traveling companion was found within the building. The jury heard his testimony and his explanations as to his conduct and activities. It is fundamental that it is the peculiar province of the jury to weigh the evidence and determine the facts. We do not and should not reverse a conviction on the evidence unless we can say, after a careful consideration, that there exists a reasonable and well-founded doubt of the defendant's guilt. See Stanton and Craddock. No such doubt exists in our minds in this case. Accordingly, the judgment of the circuit court of Edgar County is affirmed.

Affirmed:

Trapp J. and Craven J. concur.

Attorneys:

Tracy J. and Steven J. Conner.

49515

59 I.A.2 207

A

ELEANORE KLEKOVICH,
Plaintiff-Appellant,
v.
STEPHAN J. GORECKI,
Defendant-Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order dismissing plaintiff's verified complaint, entered on defendant's motion to dismiss, on the ground that the verified complaint was not filed within the period of limitations.

On March 5, 1963, plaintiff filed her verified complaint in the Circuit Court of Cook County alleging injuries resulting from an accident between an automobile in which she was a passenger and the automobile of defendant. The accident, which the complaint attributes to the fault of defendant, allegedly occurred on July 26, 1960. In addition, plaintiff's complaint alleged that on August 2, 1960, one D.G. Cerveny, called upon plaintiff, identified himself as a claims representative of defendant's automobile liability insurer, and indicated that he wished to discuss possible settlement of her claim; that plaintiff was not sure of the extent of her injury at that time, and deferred discussing settlement; that Cerveny called upon plaintiff again about a month later and, on learning that plaintiff was still under the care of a doctor, suggested that discussion concerning adjustment of the claim be held in abeyance until plaintiff was discharged from medical treatment.

The complaint also alleges that on April 30, 1962, plaintiff's doctor advised her that her condition might warrant adjustment of her claim; that plaintiff wrote a letter to defendant's insurance company, in response to which Cerveny called upon plaintiff in May 1962; that when Cerveny was advised that plaintiff's hospital and medical bills totaled

approximately $1,500.00, he told plaintiff and her husband that he would have to have written medical reports from plaintiff's doctor, since plaintiff's medical expenses were in excess of $1,000.00; and that he would obtain the necessary reports.

The complaint further alleges that plaintiff, not having heard from the insurance company, wrote to it, without response, in June, 1962 and September, 1962; that one Dean A. Del Bene called upon plaintiff, on behalf of defendant's insurance company, and requested that she sign certain forms authorizing her doctors to furnish medical reports to the insurance company; that she signed the forms furnished by defendant's insurer; that thereafter plaintiff's doctors submitted the desired reports to the insurance company, that subsequently plaintiff, having received no communication from the insurance company, wrote to the company in January 1963; and that shortly thereafter, she was advised by the insurance company that "her time had run out" and that she had no further claim.

The complaint concludes with an allegation that plaintiff relied on the representations of the insurance company's representatives to the effect that they would adjust her claim for injuries and damages, and for that reason she did not bring suit within the period of limitations. Plaintiff's attorneys also filed a jury demand.

The attorney for defendant filed a motion to dismiss, the sole ground being that the complaint showed, on its face, that plaintiff's action was not commenced within the time limited by law. The motion was supported by affidavits of Cerveny and Del Bene to the effect that they did not waive the Statute of Limitations and did not represent to plaintiff that her claim would be settled without suit being filed. The defendant's motion was also supported by a memorandum of law. On November 15, 1963, the trial court sustained defendant's motion to dismiss, also finding that there was no just reason for delaying enforcement of its order. It is from this order that plaintiff appeals, praying that the

order of dismissal be reversed and that the cause be remanded to the trial court for trial.

Plaintiff's theory of the case is: one, that by moving to dismiss the complaint, defendant admitted the pleaded facts and two, that since the questions raised by the admitted facts of estoppel to plead the Statute of Limitations and waiver of the defense of limitations were jury questions, it was error for the trial court to decide those questions on a motion to dismiss. Defendant's theory of the case is: one, that defendant's Motion To Dismiss only admitted facts well pleaded, thus it did not admit conclusions of fact or law; two, that the Statute of Limitations expresses the public policy of the State against enforcement of stale claims and plaintiff violated that policy by not filing her pleading within the limitation period; and three, the complaint failed to set forth allegations sufficient to raise a question of fact for the assertion of an estoppel.

The first contention advanced by plaintiff is that the facts of the verified complaint were well pleaded, and thus were admitted by defendants when they filed their motion to dismiss. Plaintiff also contends that even if the facts in the verified complaint were not well pleaded, defendant waived the defects by not objecting to them in the trial court. We disagree with plaintiff that the allegations of facts were well pleaded. The only allegation of representation and reliance, essentials in alleging an estoppel, were found in paragraph 12 of the complaint and these matters were only conclusions of alleged deceptive conduct found in previous paragraphs. We find, however, that we do not have to elaborate on this point, or the contention of plaintiff that defendant waived the defects by not objecting to them at the trial, as there are more obvious defects in plaintiff's verified complaint.

We agree with defendant that the Statute of Limitations expresses a policy against the enforcement of stale claims. Thus, we must turn to

plaintiff's complaint to see what facts were alleged to overcome this policy.

Plaintiff alleges that Cerveny wished to discuss a possible settlement; that Cerveny suggested that the matter of adjustment of her claim be held in abeyance until plaintiff was finally discharged by her doctor; that Cerveny advised plaintiff it would be necessary that he have medical reports from plaintiff's doctors which he would obtain; that in November of 1962, one Dean A. Del Bene requested plaintiff to sign authorization forms so that he could get the reports; and that thereafter the reports were furnished. Plaintiff concludes her verified complaint with an allegation that she relied on the representations of the insurer that they would adjust her claims and therefore, did not institute a suit within the two year period. Plaintiff contends these facts were sufficient to raise an estoppel.

A waiver is a voluntary surrender or relinquishment of some known right, benefit or advantage, while an estoppel is the inhibition to assert it. In the instant case we are dealing with an estoppel and we must determine if plaintiff alleged sufficient facts to raise any bar to the running of the period of limitation. In order for plaintiff to raise an estoppel against defendant, she had to allege that the agents of the insurer made misleading statements or engaged in deceptive conduct, and that plaintiff actually believed in them, and as a result was lulled into a sense of false security, to her detriment. Plaintiff in her verified complaint only alleged that the agents of the insurer wished to discuss possible settlement of her claim. There was no allegation of a promise to pay or admission of liability. No representations were alleged that the case would be settled or that plaintiff was requested to delay taking any appropriate action, other than a suggestion by the agent of the insurer that any adjustment of her claim be held in abeyance until plaintiff was finally discharged by her doctor. Plaintiff also alleged certain matters which occurred after the Statute had run. These matters

have no bearing on what plaintiff did or failed to do before the expiration of the limitation period. Finally plaintiff alleged that she relied on the representations of the agents that they would adjust her claim. As stated previously these allegations were only conclusions of the previous allegations and even if not conclusions of the previous allegations they were still insufficient, because standing alone, they could not raise an estoppel.

We now turn to the case of Kinsey v. Thompson, 44 Ill. App.2d 304, 194 N.E.2d 565 (1963) cited by plaintiff. It is distinguishable from the case at bar in a number of significant aspects. In the Kinsey case the plaintiff employed an attorney who engaged in extended and intensive settlement negotiations. In the course of the opinion the Court observes that liability was apparently conceded by the adjuster as the adjuster told plaintiff's attorney that he agreed that the settlement negotiations must contemplate a substantial payment. In that case not only were medical reports furnished, but in addition, plaintiff was examined by a physician selected by the insurance company. Photostatic copies of plaintiff's income tax returns were procured and given to the insurance company. Numerous and extended settlement conferences were carried on throughout the two-year limitation period and specific settlement figures were discussed. There was a demand for $25,000 which was finally reduced to $20,000. The adjuster told the attorney that he was aware that settlement would be in excess of $15,000. At the time the limitation period expired the parties were apparently trying to come to some agreement on the extent of plaintiff's loss of earnings, which was the reason for the production of the income tax returns.

We submit that the case at bar bears no similarity to the Kinsey case. Liability was never conceded, no settlement figures were ever mentioned, and no actual negotiations took place. See Baker v. Baker, 161 Ill. App. 430 (1911). Medical reports were not obtained prior to the

running of the Statute. Instead of extended settlement negotiations, not even a letter or telephone call passed between plaintiff and defendant's insurance company for almost two years. The cases are not at all comparable. Plaintiff has not shown us any other authority which would sustain her position. There were insufficient facts alleged to raise the issue of estoppel and it was proper for the lower court to dismiss the verified complaint.

The order is affirmed.

ORDER AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.

Case No. 64 - 45

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1965

Abstract

59 I.A.2 296

ELMER WIEBROCK, Plaintiff-Appellant, vs. TRUMAN J. KOEHLER, Defendant-Appellee	Appeal from the Circuit Court of the Ninth Judicial Circuit of Hancock County, Illinois. Honorable Keith F. Scott, Judge Presiding

STOUDER, J.

This is an appeal from an order of the Circuit Court of Hancock County, dismissing Appellant's appeal to that Court.

A trial of right of property was held in a Justice of the Peace Court before a jury on Saturday, February 25, 1961 resulting in a verdict in favor of Appellee and against Appellant. Judgment was entered on the verdict on the same day and also on the same day Appellant prayed for an appeal to the Circuit Court of Hancock County, by writ of certiorari. Appellant thereafter filed his appeal bond on Friday, March 3, 1961. On March 11, 1964 case was stricken by the Circuit Court of Hancock County, for want of prosecution and thereafter reinstated by Appellant. On May 27, 1964, Appellee filed his motion to dismiss the appeal, alleging that the appeal bond had not been timely filed and therefore the Court had no jurisdiction to hear the appeal. The Court granted the motion and ordered the appeal dismissed from which order the Appellant has appealed.

The Appellant, in seeking a reversal of the order of the Circuit Court, urges that the filing of the appeal bond was not jurisdictional,

that the appeal bond was timely filed and that the motion to dismiss the appeal was untimely filed.

Two provisions of the Statutes are involved, they are: "Chap. 79 Sec. 142 Ill. Rev. Stat. 1963: An appeal may be taken as in other cases provided the same is prayed on the day the judgment is entered and the bond shall be given within five days from the time of entering the judgment. Writs of certiorari may be sued out as in other cases.

Chap. 131 Sec. 1.11 Ill. Rev. Stat. 1963: The time within which any Act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Sunday or is a holiday as defined or fixed in any statute now or hereafter in force in this State, and then it shall also be excluded. If the day succeeding such Sunday or holiday is also a holiday or a Sunday then such succeeding day shall also be excluded."

Appellant in support of his contention that the filing of the appeal bond within five days is not jurisdictional refers us to the case of, (Rowan vs. Matanky, 348 Ill. App. 296, 108 NE. 2d 799). However, this case involved the construction of a rule of Court concerning service of a notice of appeal upon other parties, the statute providing only for the filing of such notice of appeal. Since the Court did find the statutory provision jurisdictional and only the rule of Court non-jurisdictional this case is of little help to Appellant. The conclusion by the lower Court in the instant case that the filing of an appeal bond was jurisdictional is clearly supported by cases such as, (Rozier vs. Williams, 92 Ill. 187 at 189), which announces the rule to be in opposition to that by Appellant. In view of the precedents established by our own Illinois courts, cases referred to us by Appellant from other jurisdictions are not properly considered.

We also believe that Appellant's appeal bond was not filed within

the five day statutory period. There are numerous cases in Illinois construing Chap. 131, Sec. 1.11 Ill. Rev. Stat., 1963, referred to above such as, (Diersaen vs. Williamsburg City Fire Ins. Co. 204 Ill. App. 240 at 244), the principle of such cases being that the statute means exactly what it says. No Illinois case has been called to our attention which in any way suggest that the character of an intervening day during the period can extend the period beyond the terms of the Statute. The Appellant was required to file his appeal bond within five days from the date of the judgment. By excluding the date of the judgment and by including the last day of the five day period Appellant's bond should have been filed on Thursday, March 2nd.

Appellant also urges that because Appellee did not file his motion to dismiss the appeal for nearly three years from entry of the judgment and that because Appellee's rights were not and could not have been prejudiced by a determination of the controversy on its merits the motion should have been denied. While we are in agreement with Appellant's statement of the general principle that controversies should be resolved on the merits rather than on technical objections, nevertheless, adherence to clear unambiguous statutory provisions is the cornerstone of substantial justice for litigants. From the record it is apparent that the delay in the filing of Appellee's motion to dismiss the appeal was equally chargeable to the Appellant. Where the Court has no jurisdiction of a controversy, delay in and of itself in bringing this matter to the Court's attention cannot confer jurisdiction upon the Court.

The action of the trial court in dismissing the appeal was therefore justified and will be affirmed.

JUDGMENT AFFIRMED

Alloy, P.J. and
Coryn, J. concur

adv V 59 #1

297

Abstract

NO. 64-125

59 I.A.2 297 Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

A

THOMAS E. GIAIMO, Plaintiff-Appellant, vs. CIVIL SERVICE COMMISSION OF THE CITY OF HIGHLAND PARK, ILLINOIS, ET AL., Defendants-Appellees.	Appeal from the Circuit Court, Nineteenth Judicial Circuit, Lake County, Illinois.

ABRAHAMSON, P. J.

Appellant, a police officer with approximately thirteen years service on the Highland Park police force was tried before a Hearing Officer appointed by the Civil Service Commission of that city on charges of conduct unbecoming a police officer and city employee. At the conclusion of the hearing, the Hearing Officer submitted his recommended findings of fact, conclusions of law and decision to the Civil Service Commission. Appellant filed objections to the recommendations which were considered by the Commission who, nonetheless, ordered that the recommendations be approved and discharged appellant on the basis of the charges against him. Appellant then filed a suit in the Circuit Court of Lake County under the Administrative Review

Act seeking to reverse the order of the Commission. The Circuit Court affirmed the Commission's order of discharge and this appeal results.

Appellant contends (a) that the recommended findings of fact were against the manifest weight of the evidence, and (b) that certain conversations between appellant and other police officers were improperly excluded from the evidence.

The charges against appellant, THOMAS E. GIAIMO, hereafter called GIAIMO, were based on an incident that occurred on March 15, 1963 in the Highland Park police station. GIAIMO was on the midnight to 8:00 A.M. shift on that date as communications officer, which job kept him at his desk in the police station to handle incoming telephone calls and keep in touch with the squad cars patrolling the City.

Lieutenant David G. Dalziel, a superior officer to GIAIMO on the staff, had been in charge of a shift that apparently went off duty at 11:00 P.M. on March 14. As platoon commander it was Dalziel's responsibility to prepare reports at the end of his shift and he remained at the station to complete this task.

GIAIMO and Dalziel had some differences in the past and there was apparently considerable ill feeling between them. GIAIMO had been instrumental in a 30-day suspension suffered by Dalziel shortly before this occurrence.

At approximately 1:50 A.M. Dalziel entered the room used by GIAIMO as communications officer to file his reports in a receptacle assigned for this purpose. At this point, any agreement as to what actually happened completely breaks down. Dalziel testified that on leaving the room he noticed that GIAIMO had his foot on the top of his desk and was leaning on the side of his chair. Since he was

in a position to be viewed by the public, Dalziel ordered GIAIMO to remove his foot. GIAIMO, according to Dalziel, reacted violently to Dalziel's order, called him, repeatedly, a "son-of-a-bitch" and came towards him with his arms raised and fists clenched. Dalziel raised his own arms to defend himself and GIAIMO seized him around the neck and back. While they were thus scuffling, an Officer Lewis, who had been on Dalziel's shift, entered the room and the altercation ended.

GIAIMO testified that when Dalziel entered the room he was tying his shoelace, with his foot on his typewriter for that purpose. Dalziel, on seeing him, said "Giaimo, get your dirty feet off the desk", and then, according to GIAIMO, brought up the subject of his recent suspension, and in great anger, began flailing his arms and hands and calling GIAIMO a "son-of-a-bitch". Dalziel then assumed a boxer's stance, and in order to defend himself from the anticipated onslaught, GIAIMO pinned Dalziel's arms to his side.

GIAIMO was subsequently charged with conduct unbecoming a police officer and city employee in that, while on duty, he attacked a superior officer and used profane and threatening language to that officer.

There were no eye-witnesses to the commencement of the fray, but Officer Lewis was on the scene some moments after it began. His testimony tended to substantiate the version given by Dalziel. GIAIMO, after Lewis and Dalziel had departed, called in the commander of his shift from a squad patrol and told him what occurred. It was this conversation, together with one later with another officer, that was excluded by the Hearing Officer at the trial. We think that the exclusion was proper. Appellant contends that inasmuch as the first

conversation took place within fifteen minutes of the episode that it should have been admitted under one of the exceptions to the rule against hearsay testimony. The exception to which they refer has been described in People v. Poland, 22 Ill. (2d) 175, 181, as a 'spontaneous declaration', in the following language:

> "When a declaration is made under the immediate influence of the occurrence to which it relates and so near in time as to negative any probability of fabrication, said declaration is admissable."

We do not feel that GIAIMO'S conversations with his fellow officers could properly be described as spontaneous. He called them by means of the intercommunication radio after Dalziel and Lewis had left. He was left by himself a sufficient period of time to compose himself and reflect on the possible consequences of what had transpired. He had ample time to fabricate a favorable version of the event. Whether or not he did in fact so do is not material to the issue presented.

We also do not feel that the decision of the Civil Service Commission or its finding of facts are against the manifest weight of the evidence. To be sure, there is a sharp dispute as to what occurred. However, in such cases it is the duty of the fact finding tribunal to hear the evidence, determine the credibility of the witnesses, weigh the probabilities and arrive at a decision. Taylor v. Civil Service Commission, 33 Ill. App. (2d) 48, 52. Unless that decision is such that the court feels that an opposite conclusion is clearly evident, it will not be upset on review. Sudduth v. Board of Fire & Police Commissioners, 48 Ill. App. (2d) 194, 208; Bruno v. Civil Service Commission, 38 Ill. App. (2d), 100, 106-107. We feel that the record contains ample evidence to support the decision of the Commission and the trial court. While it is not inconceivable that an opposite decision might have been reached, such is not the test to be applied.

Therefore, for the reasons stated, the decision of the Commission and judgment of the trial court will be affirmed.

AFFIRMED.

Moran and Davis, J. J., Concur.

No. 64-42

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

The People of the State of Illinois, ex rel, William R. Nash, State's Attorney, Appellant, vs. The City of Loves Park, Illinois, Appellee	Appeal from the Circuit Court of Winnebago County

CARROLL - J.

This is a quo warranto proceeding brought on the relation of the States Attorney of Winnebago County to oust the defendant, City of Loves Park, from exercising governmental and municipal authority over certain territory consisting of 14 separate pieces of land.

The complaint filed March 7, 1962 is in 14 counts, each referring to and describing a separate tract and giving the date of the particular ordinance under which it was annexed. The counts and corresponding date of each annexation ordinance are as follows: Count 1, April 6, 1969; Count 2, December 21, 1959; Count 3, February 1, 1960; Counts 4 and 5, February 15, 1960; Count 6, February 20, 1961; Counts 7 to 14 inclusive, September 25, 1961. The defendant's answer admitted the several annexations described in the complaint but denied their invalidity. The defendant also asserted an affirmative defense that in a prior quo warranto proceeding the Circuit Court of Winnebago County, in Cause No. 73201 of that court, on July 22, 1960 entered a final judgment declaring

No. 64-42

The Honble Sir [illegible]
Pet. William [illegible]

The City of Ottawa [illegible]

CANADA: [illegible]

This is [illegible]
of the Ottawa Admiralty [illegible]
City of Ottawa Bank, [illegible]
authority over certain [illegible]
of fact,

The complaint [illegible]
referring to said [illegible]
of the particular [illegible]
counts and correspond[illegible]
follows: Count 1, April [illegible]
Count 2, February 1, 1940; [illegible]
6, February 20, 1942; [illegible]
The defendants answer [illegible]
in the complaint but [illegible]
asserted an affirmative [illegible]
ceeding the Circuit Court of [illegible]
of that court, [illegible]

the same identical territory described in part of Count 2 and in Counts 3 and 4 to have been legally and validly annexed to the City of Loves Park.

On the trial it was stipulated by the parties that the territory described in the prior quo warranto proceeding, is the identical territory described in part of Count 2 and in all of Counts 3 and 4 of the complaint; that the parties to said prior action were the same as those in the instant proceeding; that the decree in the prior action has not been vacated; and that it stands as a final judgment. It was further stipulated that all procedural steps in connection with the annexation of the several parcels of land described in the complaint were properly taken and that in such respect the plaintiff does not challenge the validity of the initial ordinances. It was further stipulated that a map received in evidence as defendant's Exhibit 1, is an accurate, complete and true map of the territory in dispute, and that the dimentions of the several tracts annexed by the defendant city as shown on said map are accurate, complete and true.

The trial court entered judgment for the defendant denying the relief prayed by plaintiff and declaring the territory described in Counts 1 through 14 inclusive to be validly and legally annexed to the City of Loves Park. The decree also included a finding that the judgment in the prior quo warranto proceeding, cause No. 73201 in the Circuit Court of Winnebago County is res judicata as to the question of the validity of the annexation of the territory described in Counts 1, part of 2 and all of 3 and 4.

Plaintiff contends that at the time of the adoption of each of the annexation ordinances, the lands therein described were not contiguous to the defendant city within the meaning of the Municipal Code and that each such ordinance was therefore invalid. It is further

the same identical territory described in [illegible]
County] and] to have been legally [illegible]
of Iowa Park.

On the trial it was admitted by [illegible]
territory described in the [illegible] was a
[illegible]ed territory [illegible] in [illegible]
] and] of this complaint; that the [illegible]
the same as those in [illegible]
prior action had been [illegible]
judgment. It was further admitted [illegible]
connection with [illegible]
verdicts in the respective [illegible]
the plaintiff [illegible]
cases. It was further admitted [illegible]
reasonable value[illegible] ; [illegible]
territory in dispute, [illegible]
annexed by the [illegible] and [illegible]
complete and true.

The [illegible]
the police power [illegible]
in County] wherein [illegible]
to the City of Iowa Park, [illegible]
the judgment in the [illegible]
in the City's favor of [illegible]
question of the validity, [illegible]
in County], part of [illegible] .

Plaintiff complains [illegible]
of the annexation [illegible] the City [illegible]
contiguous to the defendant [illegible]
Code and that such action was therefore illegal. [illegible]

contended that the judgment in cause No. 73201 is not res judicata as to the validity of the annexation covered by Count 1.

Consideration will be first accorded plaintiffs' point with respect to counts 1, 2, 3, and 4. In the prior proceeding, the validity of the annexation of the territory described in Count 1 was not attacked. The territory described in Counts 2, 3, and 4 had a common boundary with the City of Loves Park along the Northerly part of the Count 1 tract for a distance of 400 feet. Obviously the territory in Count 1 was contiguous to Loves Park, for otherwise there would have been no basis upon which the court in the prior proceeding could rest its determination that the territory described in Counts 2, 3, and 4 had been validly annexed. The failure of plaintiffs to challenge the validity of the Count 1 annexation in the prior proceeding would seem to be a strong indication that plaintiff at that time entertained no doubt concerning its contiguity. Here we have a situation where as between the prior and instant actions there is an identity of parties, subject matter, and causes of action. If lack of contiguity as to the Count 1 territory was a defense in Cause No. 73201, it should have been presented in that action. Under the circumstances, we think the trial court was correct in holding that the judgment in the prior action is res judicata as to the question of the validity of the annexation of the territory described in Counts 1, 2, 3, and 4 of the instant complaint. See People v. Kidd, 398 Ill. 405.

Count 5 describes an annexation of a strip of land 1 foot wide and extending West from the Count 4 territory, a distance of 660 feet and widening at its West end. The land described in Count 6 is a strip 83 feet wide and extending 1377 feet due East from the Count 4 territory and connects with Forest Hills Road, a highway running generally in a North and South direction. The question

presented by both counts 5 and 6 is whether the territory described in each can be said to be contiguous to the municipality of Loves Park. Neither of these two territories can be said to be adjacent to and parallel to the existing municipal limits. On the contrary, the areas involved in these two counts are strips of land which are completely surrounded by non-municipal territory except as to the narrow end of each which abuts the city limits. It is our view that the action of the municipality as it pertains to these two particular tracts amounts to strip or corridor annexation, which has been consistently condemned by the courts of this state. Wild V. The People ex rel Stephens, 227 Ill. 556; Village of Morgan Park v. City of Chicago, 255 Ill. 190. Our approval of the annexations described in Counts 5 and 6 would offend against such established policy. In sustaining their validity, the trial court erred.

The annexations attacked in Counts 7 to 14 inclusive were made by separate ordinances, all of which were adopted on September 25, 1961.

The territory annexed by the first of such series of ordinances is described in Count 7. It consists solely of a roadway designated on the map as Maple Avenue which extends 1325 feet East from the Count 4 annexation to Alpine Road. The city next annexed the territory described in Count 8 which included all of Maple Avenue previously annexed with the addition of a strip of land parallel to and adjoining Maple Avenue on the South and a small triangular parcel of land extending Northeast from Maple Avenue. Count 9 alleges the annexation of 3500 feet of Alpine Road running North from Maple Avenue and 3300 feet of Harlem Road extending East and West from its intersection with Alpine Road. The final ordinance adopted and which is set out in Count 14 provided for the annexation of a part of Harlem Road

extending from the Westerly terminus of the annexation described in Count 9 to a point in line with the West boundary of the land described in Count 4. The result accomplished by the ordinances referred to in Counts 7, 8, 9 and 14 was the annexation of portions of Maple, Alpine and Harlem roads which were beyond the corporate limits of Loves Park. The city then annexed the territories described in Counts 10, 11, 12 and 13. At the time of their annexation such territories were not adjacent to and parallel to the then existing municipal limits. They were adjacent only to the highway network previously annexed by the ordinances described in Counts 7, 8, and 9.

Chap. 24, par. 7-1-10, Ill. Rev. Statutes 1963 provides that a municipality may annex territory dedicated for highway purposes if such territory is contiguous to such municipality. In People ex rel Adamowski v. Village of Streamwood, 15 Ill. 2d 595, the Supreme Court held that contiguous as employed in the statute "must mean contiguous in the sense of adjacent to and parallel to the existing municipal limits." Here the highway annexations described in Counts 7, 8, 9, and 14 were not adjacent to nor did they parallel the boundaries of Loves Park, but extended far beyond the same. Accordingly we must hold that such annexations failed to meet the contiguity requirements of the statute. The territories described in Counts 10, 11, 12, and 13 are connected to the defendant city only by the roadways described to in Counts 7, 8, 9 and 14 and accordingly the claim that such territories are contiguous to the annexing municipality is based entirely upon the validity of the roadway annexations. Since the latter failed to meet the statutory requirement of contiguity, it follows that the territory annexations detailed in Counts 10, 11, 12 and 13 must be held invalid for the same reason. People ex rel v. Village of Worth, 23 Ill. 2d 63.

Village of Jordan, 21 [illegible].

The judgment as to the territories described in Counts 1 to 4 of the complaint, inclusive, is affirmed; as to the remainder of the territories described in the complaint the judgment is reversed and the cause remanded to the Circuit Court with directions to enter a judgment of ouster as to all of such territories.

Affirmed in part;
Reversed and remanded as to
the remainder

Abrahamson, P.J. and Moran, J. Concur.

Abrahamson, P.J. and Moran, J. Concur.

ABST.

50080

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,
v.
CHESTER DAVIS,
Plaintiff in Error.

WRIT OF ERROR TO THE CRIMINAL COURT OF COOK COUNTY, ILLINOIS

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a conviction of murder with punishment fixed at life imprisonment in the penitentiary. A jury trial was waived.

At the trial, Cleo Lloyd testified that on June 16, 1951 she had been living with the deceased, Charles Davis; that at about 8:00 P.M. she saw the deceased talking with defendant, Chester Davis, in front of the Grand Theatre at the corner of State Street and 31st Street; that she did not hear their conversation and did not see any blows struck or any arm waving by either of them; that she and the deceased returned to their apartment, the deceased immediately leaving to buy some soda; and that shortly thereafter she heard sounds she thought were firecrackers, looked out the window and saw the deceased lying on the ground.

On cross-examination, Cleo Lloyd admitted that she and the deceased had spent the day of June 16, 1951 drinking whiskey, in [illegible] apartment, on the street and under the "L" tracks, both in their neighborhood and on the West side of Chicago. She estimated that they consumed at least a pint of whiskey on that day. Cleo Lloyd admitted that she testified at the Coroner's Inquest into the death of Charles Davis. She also admitted that when questioned, at the inquest, she stated she did not know who killed the deceased and could not recall his ever having trouble with anyone. She did not state at the inquest that she had seen the deceased talking with defendant in front of the Grand Theatre on June 16, 1951.

John W. Johnson testified that he worked at the Grand Theatre at 3110 South State Street in Chicago, as a doorman and that on June 16,

1951, he worked from 1.00 P.M. to 3:00 P.M. and from 6:00 P.M. to 7:00 P.M. Johnson testified that he saw defendant with a "lady friend" conversing with Cleo Lloyd and one Evangelist Gibson. After he told them to move away from the theatre he heard what he thought was a firecracker and observed a man lying on the ground. On cross-examinatio Johnson admitted that he did not see defendant shoot the deceased.

Evangelist Gibson testified that on June 16, 1951, he was at the corner of 31st and State Streets between 7:00 P.M. and 8:00 P.M. and saw the deceased and three other people standing in front of the Grand Theatre. Gibson testified that he saw the deceased once more that night while he was drinking near an alley behind a vacant lot at 3112 South State Street; that he heard what sounded like five or six firecrackers; that he turned and saw the deceased lying face down and saw defendant inside a "grayish, greenish" Ford heading south on the west side of State Street. He further testified that he was shot in his left arm at this time.

On cross-examination Gibson testified that he began drinking with a group of persons including the deceased, at 12:00 noon on June 16, 1951; that he had spent the afternoon with the deceased drinking in an alley on the South side of Chicago, and driving to and from the West side of Chicago; that just prior to the shooting he was standing in the alley facing south, behind the vacant lot at 3112 South State Street drinking with Paulina Haynes and a man named George; that he turned to his left immediately after hearing the shots; that he saw a man wearing a blue and white, large square, plaid shirt in a car drawn up to the curb and that the car was a 1946 or 1947 Ford or Mercury; that although he recognized his uncle as the one who was shot and lying on the sidewalk, he did not go to his aid but went immediately to the "Fire Department", that after he was treated at a hospital for the bullet wound the police arrested him and kept him in jail for six or seven days in connection

with the shooting; that he testified at the Coroner's Inquest that he had not seen the person who shot his uncle; that at the inquest he said he only saw the rear end of the automobile in question and that the automobile was "darkish, greyish" and that he did not tell the Coroner anything else about the automobile and that after the inquest and his release from jail and after he had taken his uncle's body down South for a funeral and had returned to Chicago, he still had not told the police that he had seen the man who had shot his uncle.

On redirect examination, Gibson stated he was 35 feet from the car which drove away after he heard the shots. On recross-examination he explained that he was 35 feet east of the alley which ran between 31st and 32nd Streets, which alley was 125feet away from the sidewalk where his uncle was shot. On questioning by the Court, Gibson admitted that at the inquest he had testified that he was standing a good half block from the spot where his uncle was shot; that he did not know how many shots were fired; and that he was standing about 125 feet from the place where his uncle was shot.

Vincent Cunningham, an officer in the Chicago Police Department, testified that he had investigated the shooting in question and found People's Exhibit No. 1, a pellet or bullet, in a pile of lumber at the rear of 3115 South Dearborn, which was behind the vacant lot at 3114 South State Street. Cunningham also testified that he had arrested defendant for investigation on June 23, 1951 and found People's Exhibit No. 2, an empty nine millimeter shell, in the glove compartment of defendant's car; that defendant told him "that shell must have been in the car when I purchased it"; and that he asked defendant if he had shot the deceased and defendant answered that he had not. Cunningham further testified that he gave the pellet and the empty shell to a firearms expert at the Police Department Crime Laboratory.

On cross-examination Cunningham admitted that he did not find

any pellets or bullets in the [illegible] bullet identified as People's Exhibit No. [illegible] no time was defendant confronted with [illegible] while being interrogated, denied he shot [illegible] further stated that defendant denied possession [illegible] that after searching defendant's home, the police were unable [illegible] any gun.

On redirect examination, Cunningham testified that the People's witness, John W. Johnson, gave him a description of a car that he had seen at the scene of the shooting on June 16, 1951. Cunningham also gave a description of the car from which he took People's Exhibit No. 2.

The parties stipulated that Casimir Simons, if called as a witness, would testify that he is a firearms expert; that he received People's Exhibit No. 1 on June 19, 1951 and People's Exhibit No. 2 on June 23, 1951 and that in his opinion both are of a nine millimeter caliber but "that he could not say that People's Exhibit No. 1 was fired from People's Exhibit No. 2." The parties also stipulated that J. C. Kearns, a Coroner's Physician, would testify if called [illegible] he examined the body of Charles [illegible] cause of death to be four bullet holes in the upper chest of C. Davis.

James Wright testified for the defense that he knew defendant for four or five years and that his general reputation in the community in which he lived prior to June 16, 1951, for being a peaceable and law abiding citizen, was good. Wright testified that defendant came into the place where he, Wright, worked as a mechanic, 2430 South Michigan Avenue, Chicago, and that about 9:30 A.M. defendant went next door to 2420 South Michigan Avenue, where Mr. Holt did some welding on his car. He further testified that defendant left his shop shortly before 9:00 P.M. on June 16, 1951. On cross-examination, Wright testified that he visited

Holt's shop at 2420 South Michigan Avenue in Chicago, that day; that Chester Davis was working on his car while Holt did the welding; and that during the time defendant was in Holt's shop, defendant's car was raised on jacks. He further testified on cross-examination that defendant left about 8:30 P.M. On recross-examination Wright testified that he purchased parts at a store at 23rd and State Streets, in Chicago, to be used in repairing defendant's car. Whereupon Judge Corsellis stated to a police officer in the courtroom, "Officer, I want you to check that today before 2:00 P.M." On further recross-examination, Wright stated that the reason he remembered defendant was in his shop on June 16, 1951 was that defendant told him one week later, that the police had arrested him for shooting a fellow on the day he brought his car in to be fixed.

Harold Holt testified that he worked next door to 2430 South Michigan Avenue in Chicago as a mechanic; that on June 16, 1951 defendant came to his shop with James Wright at approximately 9:30 A.M. and stayed until Holt had welded his exhaust muffler and exhaust pipe; and that defendant left his shop after 8:00 P.M. On cross-examination Holt testified that defendant told him on June 23, 1951, that he had been arrested for shooting some fellow the day he was in Holt's shop for repairs; that from June 23, 1951 until Holt was served with a subpoena on about March 1, 1952, no one had talked with him about the case; that he remembered the date when defendant was in his shop because June 16th is his wife's birthday; and that defendant did not leave his shop until after 8:00 P.M. because Holt was in a hurry to get home for his wife's birthday dinner that night.

Edward Starkes testified that he was shop foreman at 2420 South Michigan Avenue in Chicago on June 16, 1951 and that defendant arrived about 9:30 A.M. and left at about 8:00 P.M. which is shortly before the shop closed. On cross-examination Starkes testified that he had a

written record showing when defendant was in the shop and the charge to defendant for the work done on his car, but that the record had been destroyed when the shop was moved to a new location in December, 1951.

Harold Holt was recalled by the defendant and testified that he personally kept a record of the work done on defendant's car on June 16, 1951; that he personally made the record in his own day book; and that it was destroyed in moving the shop to a new location.

Ethel Crawford testified that she had known defendant for several years and that he lived next door to her at 2954 South Calumet; that while she was waiting for a street car on the corner of 31st and State Streets on June 16, 1951 she saw a shooting at about 8:00 P.M. in front of the Grand Theatre; and that the man who did the shooting was in a black car and was not defendant. On examination by the court, Crawford testified that she usually saw defendant every day, working on his car in the garage behind her house, but that she did not see either defendant or his car on June 16, 1951.

Chester Davis, the defendant, testified in his own behalf and stated that he was employed by the Burton-Dixie Company at 2[illegible] Racine Avenue in Chicago and that he had been employed there in the shipping department; that on June 16, 1951, he bought two mufflers at a Blue Star Store and then went to 2430 South Michigan Avenue, where he saw James Wright and asked about having the muffler on his car repaired; that Wright introduced him to Harold Holt who did the work on his car; and that he stayed on the premises until he left at about 8:00 P.M. Defendant further stated he did not shoot the deceased; that his car was not parked on South State Street in the 3000 or 3100 blocks at any time on June 16, 1951; that he was not in front of the Grand Theatre between 7:00 P.M. and 8:00 P.M. talking with the deceased and Cleo Lloyd on June 16, 1951; and that People's witness Johnson never told him to move away from the front of the Grand Theatre. Defendant also

testified he knew the deceased since both worked in the same place; that he learned that the deceased was dead from his foreman Mr. Ed Beecher; that he was arrested on the Monday morning after the shooting; that he was kept in jail for [illegible] and then taken to a Judge on the 10th floor at 11th and State Streets and was released on bond; that the next day when he returned the [illegible] he went to 2420 South Michigan Avenue and talked with Messrs. Holt, Wright and Starkes and told them he had been arrested for killing the deceased on the day when he had had some work done by them on his car that the next day, he went back to court and after he was discharged, he returned to work at Burton-Dixie and continued living at the same address, 2954 South Calumet; that Sergeant Buckner showed defendant a shell which he said he found in defendant's car at 11th and State Streets, and asked defendant how long he had the car that defendant told him that he had bought the car before Christmas at 2929 South Michigan Avenue; that on June 16, 1951 defendant wore a pair of blue coveralls all day until he came home at about 8:15 P.M.; and that he spent the rest of the evening with his wife, a girl friend [illegible] and one Henry Hayes.

On cross-examination defendant testified that he knew James Wright for about five years and that he met Harold Holt on June 16, 1951 through James Wright; that Holt did not give him a receipt for the work he did repairing his car; that he left the premises at 2420 South Michigan Avenue only once on June 16, 1951 and that was for lunch, from about 12:00 noon to 12:30 P.M.; that he worked on his car himself until about 5:00 P.M.; that Holt began welding about 6:00 P.M. and completed the welding about 8:00 P.M.; that he then went back to the Blue Star Store where he had purchased two mufflers that morning to return one of them, but was unable to return it after he arrived, that he knew the deceased for about 15 days while he was working at the Burton-Dixie

Company; that he never knew Cleo Lloyd until [illegible] testified at this trial; that during the past five years he had been to the Grand Theatre about 20 to 25 times, but he had never seen Mr. Johnson at the Grand Theatre; and that the last time he had been there was about three months prior to Christmas in 1950.

Defendant's wife was brought to the Central Police Station, 11th and State on the night of the day when defendant was arrested and the police asked her if she and defendant had gone to the Grand Theatre. She said, "yes, we started to the show," but she did not say that she and defendant had gone together to the Grand Theatre on June 16, 1951.

Defendant offered the transcript of testimony taken at the Coroner's Inquest held in the Cook County Morgue on June 18, 1951 as Defendant's Exhibit No. 1 and it was received in evidence without objection. Defense counsel read into the record the entire transcript of the testimony given at the Coroner's Inquest.

> Cleo Lloyd testified that she did not know who shot and killed Charles Davis and that she did not know of Charles Davis ever having any trouble with anyone. Further Cleo Lloyd testified that she did not know that Charles Davis had any arguments with anyone on June 16, 1951.
>
> Floyd Smith testified that he did not know who shot and killed Charles Davis. He testified that he was sitting in front of a tavern at 3130 South State Street when he heard some shots and saw Charles Davis fall to the curb. At that time he saw a 1946 or 1947 black Ford with dust flaps and glass horns pull away from the curb. He did not see who was inside the car.
>
> Officer Miklos testified there was no eye-witnesses of the shooting and that nobody had a description of the car that was used.
>
> Evangelist Gibson testified that he was shot in the left arm but that he did not know who shot him. At the time he was shot he was standing in an alley that was a good half block from the street where Charles Davis was killed. Gibson testified he did not know how many shots were fired but that it sounded like one shot to him. He did not know whether the party that shot him was the same party that shot Charles Davis; and all he saw of the automobile involved was the rear end of it and that it looked "darkish greyish" to him. Gibson testified that the shooting caused him to miss a drink of wine and that he did "want a drink bad too."

Paulina Haynes testified that she was standing with Gibson in the alley drinking wine at the time of the shot, and that she did not know who shot Charles Davis.

In the opinion of the Coroner's Physician, Charles Davis came to his death from four bullet wounds in the chest, all four bullets going through him.

The State, in rebuttal, offered People's Exhibit No. 3, a certified and exemplified copy of a prior conviction of defendant in the State of Arkansas for murder, on May 1, 1934.

Vincent Cunningham testified in rebuttal that he searched the glove compartment of defendant's car, in his presence on June 23, 1951, and found the shell which was received in evidence as People's Exhibit No. 2; that defendant told him that the shell must have been in the glove compartment at the time that he purchased the car; that on June 24th at about 1:00 P.M. John W. Johnson viewed Chester Davis in a line-up and said he was the man he had seen arguing in front of the show on the night of June 16, 1951; and that Chester Davis was discharged from custody on the following Tuesday morning.

Edward A. Flynn testified in rebuttal that he arrested defendant on June 23, 1951; that he was present when Sergeant Cunningham showed the shell, People's Exhibit No. 2, to defendant and that defendant could not account for its being in the glove compartment of his car; that John W. Johnson saw defendant in a room where the police were keeping him and that Johnson said that defendant was arguing in front of the show; and that in response to the court's request made earlier in the day for him to check on a certain place of business, he went to Eureka Auto Parts at 2300 South State Street.

Lloyd Sands testified in rebuttal that on August 4, 1951 he arrested defendant at 1:00 P.M.; that at 2:00 P.M. he put him in a line-up at 11th and State Streets and that Chester Davis was one of six men in the line-up viewed by Cleo Lloyd and Evangelist Gibson, both of whom pointed out defendant.

Cleo Lloyd testified in rebuttal that she first saw defendant in custody in a police line-up at 11th and State Streets, that she pointed out defendant as the man with whom the deceased Charles D[illegible] had an argument; and that Evangelist Gibson [illegible] defendant. On cross-examination Cleo Lloyd admitted that she had been kept in jail about four days herself in connection with the killing in question.

Defendant's theory in this case is, one, that there was insufficient evidence to support the finding of guilt by the trial court, beyond a reasonable doubt; two, that the trial court erred in making its determination that defendant was guilty upon a private investigation by the trial judge; and three, that the trial court further erred in admitting as evidence People's Exhibit No. 1 (a 9 mm bullet) and People's Exhibit No. 2 (a 9 mm shell).

In response to defendant's first contention, the State maintains that defendant was proven guilty beyond a reasonable doubt. The State points out that Cleo Lloyd testified that she and the deceased were standing in front of the Grand Theatre and that she heard defendant say to the deceased, "I'm going, but I'll be back." The State also points out that John Johnson testified that defendant attended the theatre that evening; that he instructed defendant, Miss Lloyd, the deceased and another woman to move away from the entrance to the theatre; and that he heard defendant say, "I'll be back." The State further points out that Evangelist Gibson testified that he observed the deceased, Cleo Lloyd, another woman and the defendant together; that he heard defendant say to the deceased, "You'll never come to my house no more as long as you live"; that later in the evening he heard shots, saw the deceased fall and saw defendant withdraw from the open window of a "greyish greenish" Ford and proceed in a southerly direction down State Street. The defendant at the time of his arrest owned a grey two-door Ford with white mud flaps in the back, together with sundry decorations on both front and rear.

The State next points out that Sergeant Cunningham testified that on June 19, 1951, he recovered a 9 mm pistol in the immediate vicinity of the shooting and that after the defendant was arrested on June 23, 1951, together with other police officers he found an empty mm shell casing in the glove compartment of the defendant's car. He further related that the defendant's wife stated to the police, shortly after defendant's arrest, that she and the defendant attended the G. and Theatre together on the night of June 16, 1951, and that defendant replied, "You're wrong. I only walked as far as 31st and Wabash with [illegible]. The State concludes that there were sufficient facts offered to: one, establish a motive for the crime; two, place defendant in the immediate vicinity; and three, properly identify defendant as the deceased's assailant.

Defendant contends that there was ample evidence introduced to furnish defendant with an alibi. Defendant points out that James Wright testified that defendant was in the muffler shop until 8:30 P.M. on June 16, 1951, and that Harold Holt and Edward Starkes corroborated this testimony. We hold the alibi witnesses of defendant did not raise a reasonable doubt as to his guilt. Their testimony as to [illegible] prior to, during and after the crime was not compatible with the testimony of the State's witnesses. The trial judge found the testimony of the State's witnesses more credible. Furthermore, the alibi witnesses did not account for defendant's presence at the crucial time in question. Thus, even if the trial judge accepted their testimony in its entirety, it would still not exclude the possibility of the defendant having committed the crime, when viewed in light of all the evidence.

Defendant contends, however, that even if the trial judge did not believe his alibi, defendant was not placed in the immediate vicinity the night of the shooting. Defendant bases this contention on the

testimony of Sergeant [illegible] standing the Grand Theatre on June 16, 1951. We disagree [illegible] defendant. Several persons placed defendant in the immediate vicinity. The trial judge heard the testimony of these persons along [illegible] testimony of defendant and resolved the contradictions in the [illegible] against defendant.

Defendant further contends that he was not properly identified. Defendant bases this contention on two separate allegations: one, that the testimony of Gibson and Miss Lloyd was not credible and two that it was highly improbable that Gibson could identify defendant. In support of his first allegation, defendant points out that there was testimony by both Gibson and Miss Lloyd that they testified at the Coroner's Inquest and did not mention that they saw defendant in front of the Grand Theatre on the day of the shooting. Defendant maintains that the testimony of both witnesses was impeached by their silence and, on oral argument, cites People v. Lawrence, 411 Ill. 155, 160 (1906) in support of his position. An examination of that case reveals that it not only does not stand for the proposition that defendant attributes to it but rather indicates that, "unless he was so specifically interrogated or was so directed, invited or given opportunity to do so at the trial, it is entirely immaterial whether he then made the same statements on this subject that he made on the trial of the case."

In support of his second allegation, defendant maintains that Gibson admitted he was drinking both before and at the time of the shooting and that he testified that he was some distance from the side of the shooting. We disagree with defendant as to this allegation also. Gibson was in the direct line of fire, standing approximately 35 feet west into the vacant lot. He explained that the alley near which he was standing at the time of the shooting was located west of the vacant lot and extended north to south between 31st Street and 32nd Street. Gibson described the defendant's vehicle as a 1946-1947 Ford or Mercury, greyish in color with mud flaps on its rear. Defendant owned such a vehicle.

Gibson, several days after the shooting, identified the defendant in a line-up of 5 or 6 men, which was conducted at the 11th and State Police Station. He explained the discrepancy in his testimony before the Coroner's Inquest relative to where he was standing when he heard the shots, as meaning "half way to the alley" rather than "a half a block away."

We conclude that the State proved defendant guilty beyond a reasonable doubt. When an objective evaluation is made, regarding all the circumstances surrounding this homicide, it cannot be said the trial court erred in finding there was sufficient evidence to establish the defendant's guilt beyond a reasonable doubt. Where, as here, a case is tried without a jury, it is the function of the trial court to determine the credibility of the witnesses and evaluate conflicting evidence, and a conviction based thereon will be reversed on review only where the evidence is so unreasonable, improbable or unsatisfactory as to leave a reasonable doubt of the defendant's guilt. People v. Washington, 27 Ill.2d 104, 110, 187 N.E. 739 (1963); People v. Harris, 8 Ill.2d 431, 436, 134 N.E.2d 315 (1956); People v. Brown, 392 Ill. 519, 521-522, 64 N.E.2d 882 (1946) People v. Boney, 28 Ill.2d 505, 510, 192 N.E.2d 870 (1963). The trier of fact "is not required to search out a series of potential explanations compatible with innocence, and elevate them to the status of reasonable doubt." People v. Huff, 29 Ill.2d 315, 320, 194 N.E.2d 230 (1964); People v. Russell, 17 Ill.2d 328, 331, 161 N.E.2d 309 (1960).

Defendant's second point is that the court committed error by directing Officer Edward Flynn to investigate witness James Wright's testimony relative to his purchase of an auto muffler at 23rd and State Streets shortly after he said he met defendant on the morning of June 16, 1951. In response to defendant's second point, the State contends that the trial court, in determining the defendant's guilt, did not consider any matters from its personal knowledge or its private investigation. We agree with the State's contention. Officer Edward Flynn testified in

rebuttal and corroborated both Sergeant Cunningham's testimony relating to the finding of an empty 9 mm shell casing in the glove compartment of the defendant's car and Johnson's identification of defendant. When Officer Flynn was about to relate what his investigation revealed, regarding the court's earlier request as to the purchase of the muffler, defense counsel's objection to the admission of such testimony was sustained before any relevant matters were disclosed. Although we agree with the authority cited by defendant we submit that it is inapplicable to the facts in the case at bar. In People v. Wallenberg, 24 Ill.2d 350, 181 N.E.2d 143 (1962), the personal knowledge of the judge was used to contradict important testimony offered by the defense. The two situations are clearly dissimilar. In Wallenberg, the judge explicitly indicated that he did not believe defendant because of a discrepancy between defendant's alibi and the judge's own personal knowledge. In the instant case, the judge requested Officer Flynn to investigate a circumstance of one of the defendant's alibi witnesses, but later refused to hear any evidence regarding such investigation. Therefore, it is difficult to understand how defendant was prejudiced by the court's request.

In response to defendant's third point, the State contends that defendant was not prejudiced by the placing of the pellet and shell casing into evidence. We agree with the State. It is difficult to envision any prejudice to defendant resulting from this evidence. There is a presumption that a judge, when sitting as the trier of facts, considers only admissible evidence in arriving at a finding. People v. Robinson, 30 Ill.2d 437, 439, 197 N.E. 45 (1964); People v. Alexander, 21 Ill.2d 347, 353, 172 N.E.2d 785 (1961). We submit that the record in this case is consistent with this presumption. For the above reasons the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and BRYANT, J., concur.